IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

GAITHER MOORE,	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No. 7:04-CV-00595**
	)	
B.A. BLEDSOE, Warden,	)	**By: Michael F. Urbanski**
and the UNITED STATES PAROLE	)	**United States Magistrate Judge**
COMMISSION, et al.,	)	
Respondent.	)	

AMENDED REPORT AND RECOMMENDATION

Petitioner, Gaither Moore, has petitioned the court for a writ of habeas corpus under 28 U.S.C. § 2241 alleging that the United States Parole Commission ("Commission") has violated his constitutional rights regarding his sentence. This matter is again before the court on respondent's motion for dismissal of the petition. The court previously entered a Report and Recommendation recommending dismissal of petitioner's complaint well after the deadline provided for petitioner to respond, but before he actually did so. Petitioner responded to respondent's motion to dismiss one day after the May 25, 2005 entry of the court's previous Report and Recommendation.

To allow for the efficient adjudication of petitioner's claim, the court now enters a Supplemental Report and Recommendation taking petitioner's albeit late response into account. For the reasons outlined below, it is the recommendation of the undersigned that respondents' motion be granted and the petition be dismissed.

I

Petitioner is serving a sentence of thirty years to life which was imposed by the District of Columbia Superior Court on March 10, 1983 following his conviction for armed robbery, murder II while armed, and robbery. He became eligible for parole on September 3, 2004. In preparation for petitioner's initial parole hearing, an examiner of the Commission prepared an "Initial Pre-hearing Assessment" on February 17, 2004.

The examiner found that, on January 19, 1982, petitioner and another person robbed a McDonald's restaurant in Washington, D.C. After the pair announced a hold-up, petitioner approached the security guard and shot him once in his head, which resulted in his death. At the time this event occurred, petitioner was on parole under the Federal Youth Corrections Act, 18 U.S.C. § 5010(c) for manslaughter while armed. Petitioner had been on parole from this earlier homicide since July 15, 1980. It was also reported to the Commission that petitioner and other persons had been implicated in three additional armed robberies in 1982, for which the petitioner was not prosecuted.

The hearing officer calculated petitioner's Salient Factor Score and Base Point score in compliance with the requirements of 28 C.F.R. § 2.80. The Salient Factor Score measures the statistical probability of parole failure of any kind. The Base Point Score measures the "type of risk," i.e., the likelihood that parole failure, if it occurs, will involve some violent crime. Id. § 2.80(c). In calculating petitioner's Base Point Score, the examined assigned three points under Category II because "petitioner committed acts of violence in the current offense and felony violence in one prior offense." Petitioner also received three points in category III because "Current offense involved high level of violence or resulted in the death of victim." This gave petitioner a Base Point Score of seven out of a possible ten. Petitioner's total guideline range was calculated to be 311 to 329 months.

Petitioner attended an initial hearing held at U.S.P. Lee on March 2, 2004. At the hearing, the hearing examiner summarized petitioner's program achievement and noted that he had been in custody 265 months as of the hearing date. The examiner found that this was "significantly below the guideline." See (Hearing Summary, found at Resp., Exh. C, at 21.) The examiner was troubled by the fact that petitioner "...is serving his second conviction for an offense which resulted in the death of the victim," which, in his view, made a decision below the guideline range not warranted. Id. The examiner recommended the maximum rehearing time, a five-year set-off. Id. Having done this, the examiner then concluded that the maximum set-off allowable under 28 C.F.R. § 2.75(a)(2) would be to the minimum of the applicable guideline range, which would be a set-off of 46 months. See (Resp., Exh. D.)

By Notice of Action dated April 1, 2004, the Commission denied parole and scheduled petitioner for a reconsideration hearing in January, 2008, following the service of 46 additional months from his initial date of March 2, 2004. Under the Commission's rule then in effect, because the decision was in conformity with petitioner's guideline range, it was not appealable.

II

A prisoner seeking habeas corpus relief under Section 2241 must demonstrate that "he is in custody in violation of the Constitution or laws or treaties of the United States." See 28 U.S.C. § 2241(c)(3). Among other things, petitioner contends that the Commission acted improperly when it looked at his previous history of violent crimes in calculating when he can be released. Additionally, petitioner contends that the National Capital Revitalization and Self-Government Improvement Act, Pub. L. No. 105-33, 111 Stat. 712 (1997) ("Revitalization Act") was enacted ex post facto because it

had an adverse effect on his sentence. See (Pet. Amend. Mot. at 2.) Petitioner also alleges that the Revitalization Act's application to him is also a violation of the Equal Protection Clause. Id. at 5-6. Having reviewed all of these allegations, it is the recommendation of the undersigned that the petition be dismissed for failure to state a claim for which relief can be granted.

The Revitalization Act vested the United States Parole Commission ("USPC") with the sole authority to administer the District of Columbia parole system on August 5, 1998. See The National Capital Revitalization and Self-Government Improvement Act, Pub. L. No. 105-33, § 11231(a)(1), 111 Stat. 712, 745, codified at D.C. Code § 24-131(a)(1) (2005) ("Not later than one year after August 5, 1997, the United States Parole Commission shall assume the jurisdiction and authority of the Board of Parole of the District of Columbia to grant and deny parole....") Thus, the Commission is responsible for making any parole release decisions for all eligible D.C. Code felony offenders, including petitioner. In making such decisions, the Commission must follow the parole laws and rules of the District of Columbia as amended and supplemented by the Commission. The Commission has amended the parole rules and guidelines of the District of Columbia. See 28 C.F.R. § 2.80, et seq.; see also Muhammad v. Mendez, 200 F. Supp. 2d 466-469-70 (M.D. Pa. 2002).

A. The Commission Acted Properly when it Considered Petitioner's Risk of Violence

Petitioner's first argument is that the Commission erred when it considered his previous conduct. Having reviewed the relevant law, the court finds no support for this argument. Petitioner's second argument is related to his first: he contends that the method in which these criteria were applied to him violated the ex post facto clause of the United States Constitution. Petitioner was found guilty of

violations of the D.C. Code. For D.C. Code prisoners, parole decisions are governed by D.C. Code § 24-404(a), which authorizes parole when it appears that there is "a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his release is not incompatible with the welfare of society, and...he has served the minimum sentence imposed...."

D.C. Code § 24-404(a) has been interpreted by the District of Columbia Court of Appeals to include consideration of "whether release on parole is consistent with public safety." See White v. Hyman, 647 A.2d 1175, 1179 (D.C. 1994) (upholding denial of parole and a 5-year offset for a D.C. Code prisoner). Reviewing courts have routinely upheld denials of parole where, among other considerations, the Commission considered a prospective parolee's violent past. See Ellis v. District of Columbia, 84 F.3d 1413, 1420 (D.C. Cir. 1996) (upholding parole denial based upon the prospective parolee's "unusual cruelty to victims" plus a psychological report); Muhammad v. Mendez, 200 F. Supp. 2d 466, 473 (M.D. Pa. 2002) (upholding denial of parole where there was a serious risk of danger to the community on release as the prospective parolee had engaged in multiple acts of violence); Mason v. U.S. Parole Comm'n, 768 A.2d 591, 593 (D.C. 2001) (upholding a five-year set-off about the guideline range because the prisoner's offense showed a degree of "wantonness beyond that required to complete the [charged] kidnaping and a willingness to engage in even more violent acts"); see also Duckett v. U.S. Parole Comm'n, 795 F. Supp. 133 (M.D. Pa. 1992) (holding that a denial of parole because the prisoner's violent record showed him to be a "serious risk to the public" was authorized by the precursor statute to D.C. Code § 24-404 and did not reflect the application of an impermissible federal standard).

Here, the Commission denied parole in accord with a Total Guideline Range that reflected a

probabilistic evaluation of the risk posed by petitioner's release to the public. Petitioner's Base Point Score was enhanced because of his multiple past crimes of violence such as to provide a fair measure of the degree to which his release on parole would threaten public safety. See 28 C.F.R. § 2.80(c). Petitioner's Base Point Score is not a form of "double counting" because the factors the Commission used to enhance the guideline range were only used once, and not twice, during the course of establishing the Base Point Score. In this case, the Commission made efforts to conform its decision to the Guideline Range. Parole decisions within the guideline range are committed to the Commission's discretion, and are not amenable to judicial review. As to this claim, petitioner's writ must be denied.

B. The Revitalization Act Does Not Violate the Ex Post Facto Clause.

1. The Parole Guidelines are Not "Laws" for Ex Post Facto Purposes.

Petitioner claims that the application of the Commission's guidelines to him violates the ex post facto clause of the United States Constitution. The ex post facto clause of the Constitution prohibits the enactment of any law that is retrospective in nature and disadvantages the offended affected by it. See U.S. Const. art. 1, § 9, clause 3; Weaver v. Graham, 450 U.S. 24, 28 (1981). A law is retrospective if it "changes the legal consequences of acts completed before its effective date." Weaver, 450 U.S. at 31. In his response to respondent's motion to dismiss, petitioner states that

> Here, the application of the legislation of the Revitalization Act of 1997, creates the type of parole criteria that is onerous to the old style parole criteria that was enacted for individuals such as Petitioner.

(Pet. Resp. at 3.) Having reviewed the Act and relevant case law, the court must conclude that petitioner's argument is incorrect.

Although the Fourth Circuit Court of Appeals has not determined whether or not the USPC

guidelines constitute laws for ex post facto purposes, the majority of other circuit courts that have considered this issue, however, have decided it in a fashion contrary to petitioner's position. See Dinapoli v. Northeast Parole Comm'n, 764 F.2d 143, 146 (2d Cir. 1985) (stating that the federal parole guidelines "are not 'laws' within the meaning of the ex post facto clause"); (Sheary v. U.S. Parole Comm'n, 822 F.2d 556, 558 (5th Cir. 1987) (declaring that "there is no ex post facto violation in retrospective application of the [Parole Commission] guidelines."); Ruip v. United States; 555 F.2d 1331, 1335 (6th Cir. 1977); Inglese v. U.S. Parole Comm'n, 768 F.2d 932, 935-36 (7th Cir. 1985) (holding that the Commission "parole guidelines are not 'laws,' and therefore can be applied ex post facto without violating petitioner's constitutional rights."); Rifai v. U.S. Parole Comm'n, 586 F.2d 695, 698 (9th Cir. 1978) (stating that the Commission's guidelines "are merely procedural guideposts, without the characteristics of laws."); Dufresne v. Baer, 744 F.2d 1543, 1550 (11th Cir. 1984). As the Eleventh Circuit said, the Commission's parole guidelines "merely indicate when, in most cases, the prisoner can expect release. We agree with the Second, Sixth, Seventh, and Ninth Circuits that the parole guidelines do not have the force and effect of law. " Dufresne, 744 F.2d at 1550. The only other decision on point in the Fourth Circuit agrees with this position. McKissick v. U.S. Parole Comm'n, 295 F. Supp. 2d 643, 647 (S.D. W. Va. 2003).

The undersigned agrees with these courts that the Commission's parole guidelines do not constitute laws for the purposed of ex post facto consideration. The guidelines merely operate to provide a framework for the Commission's exercise of its discretion. See 28 C.F.R. § 2.18 (stating that "[t]he granting of parole to an eligible prisoner rests in the discretion of the U.S. Parole Commission."). Thus, the respondent's application of its amended parole rules and guidelines in

petitioner's case is not an unconstitutional violation of the ex post facto clause.[1]

2. Even If the Guidelines are Laws, There Was No Ex Post Facto Violation.

Even if the parole guidelines were to constitute laws, their application in this case would not violate the ex post facto clause. As previously stated, a law violates the ex post facto clause if it is retrospective and disadvantages the person affected by it. See Weaver, 450 U.S. at 28. Regarding the second element of an ex post facto claim, a person is disadvantaged by "any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." Id. Thus, even if a law is retrospective, it does not violate the ex post facto clause unless it adds to the quantum of punishment. See id. at 30-31. Here, the amount to which petitioner was sentenced did not increase. Petitioner was initially sentenced to thirty years to life; he has not served near that at the time of the Commission's hearing.

While the Revitalization Act requires the Commission to follow the existing parole laws and rules of the D.C. Parole Board, the Commission, much like the Parole Board before it, has the power to "amend and supplement" the D.C. parole rules. D.C. Code § 24-131(a)(1); see also Muhammad v.

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[1] In his response, petitioner also appears to argue that the Revitalization Act caused a change in who determines whether he is eligible for parole. See (Resp. at 3) (stating that "[T]here is a distinct difference with who determines whether a D.C. parolee is released. The Conservative minded members overseeing the parole eligibility of D.C. prisoners housed within federal custody ignore their obligation with applying standard parole regulations suitable for release insofar as indeterminate sentencing scheme."). It is clear petitioner has no constitutionally-protected right to either a "liberal minded" or "conservative minded" parole board. The composition of parole boards necessarily changes over time as does the composition of every other governmental entity in the U.S. system. As such, petitioner could have no right to a parole board composed of persons of a mindset more favorable to his position. Given this, the court will confine its analysis to petitioner's other legal arguments.

Mendez, 200 F. Supp. 2d 466, 470 (M.D. Pa. 2002). Consequently, the Commission could supplement the D.C. Parole Board's regulations by incorporating a new guideline system in order to guide its decisions concerning when persons situated like petitioner were entitled to a hearing. As such, there has been no ex post facto violation in this case.

C. Differential Treatment of Prisoners Guilty of Violating Federal Law and the D.C. Code Does Not Violate Any Constitutional Right.

Petitioner's final contention is that he has been treated differently than a similarly-situated federal prisoner because prisoners convicted of violating federal law have a right to appeal while those found guilty of violating the D.C. Code do not. (Petition at 10-11.) Petitioner indicates that

> [I]t is clear that both Federal inmates and D.C. Code inmates are subjected to identical Parole procedures and substantive regulations. Both are examined by the same agency, and receive their final decision from the USPC....[As such, D.C. Code inmates should] be afforded Administrative Appellate rights.

Id. at 11. In his response, he indicates that "The Equal Protection Clause prevents governmental decision makers from treating differently persons who are in all relevant respects alike." (Pet. Resp. at 5.)

Petitioner's assertion that he is similarly situated to other federal inmates is incorrect. Petitioner is not similarly situated to federal inmates because prisoners under federal law, and D.C. law, have different laws applied to them. Petitioner is a D.C. Code inmate; the federal inmates have been convicted of violations of federal law. They are not similarly situated for equal protection analysis. See Moss v. Clark, 886 F.2d 686, 686 (4th Cir. 1989) (upholding statutory difference in good time credits for federally-housed D.C. Code prisoners for equal protection analysis). As petitioner is not similarly

situated to federal inmates, strict scrutiny is inapplicable.

Finally, the law is well established that D.C. Code prisoners have no constitutionally-protected liberty interest in parole under District of Columbia law. See Price v. Barry, 53 F.3d 369, 370 (D.C. Cir. 1995). Prisoners do not derive any due process rights from the parole guidelines. See Blair-Bey v. Quick, 151 F.3d 1036, 1047-48 (D.C. Cir. 1998); see also Simmons v. Shearin, 295 F. Supp. 2d 599, 602 (D. Md. 2003) ("The D.C. parole statute and regulations, applicable to D.C. offenders even after they are transferred to the jurisdiction of the U.S.P.C., do not create any liberty interest in parole."); Ellis v. District of Columbia, 84 F.3d 1413, 1420 (D.C. Cir. 1996). Additionally, petitioner has no due process right to the procedure afforded to federal inmates under the Commission's guidelines because he is not a federal inmate. Because petitioner has no equal protection or due process interest in an administrative appeal, his claims regarding this should be dismissed.

III

The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to filed specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is hereby directed to send a certified copy of this Report and

Recommendation to plaintiff and counsel of record.

ENTER: This 27th day of May, 2005.

/s/ Michael F. Urbanski
United States Magistrate Judge